1982 WL 1578
United States District Court, S.D. Texas, Houston Division.

K.K. COBLE, et al., Plaintiffs,
v.
TEXAS DEPARTMENT OF CORRECTIONS, Defendant.

Civ. A. No. H–77–707. | Dec. 20, 1982.

Attorneys and Law Firms

Art Brender, Fort Worth, Texas, and Carro Hinderstein, Houston, Texas, for plaintiffs.

Mark White, Attorney General, Richard E. Gray, III, Executive Assistant Attorney General, and Mary Katherine Conroy, Assistant Attorney General, Austin, Texas, for defendant.

Opinion

Memorandum and Order

BLACK, District Judge.

***1** This class action was brought under Title VII of the Civil Rights Act of 1964 alleging sex discrimination by Defendant. Plaintiff Coble sought employment as a correctional officer and she alleged that, although she was qualified, she was denied employment at an all-male unit of the Texas Department of Corrections (TDC) because she was a female. Plaintiff Beneze alleges that she had been accepted into a summer internship program by TDC, then was denied free housing because of her sex.

On November 4, 1981, the Court certified a class of:

All women who—

(1) are presently employed by TDC, or

(2) have sought employment with TDC since November 2, 1972 and were employed, although not currently employed, or

(3) have sought employment with TDC and were not employed, or

(4) may in the future seek employment with or be employed by TDC.

Only the issue of liability was tried by the Court, but the scope of the class became an issue and by this Memorandum and Order the Court feels it appropriate to narrow the scope of the class.

The Court makes the following:

Findings of Fact

1. Plaintiffs K.K. Coble and Donna Riggs Beneze are both female citizens of the United States and have resided in Texas at all times material hereto.

2. The Texas Department of Corrections is an employer within the meaning of 42 U.S.C. § 2000e(b).

3. On November 7, 1974, Plaintiff Coble applied for a position as correctional officer with TDC indicating that she preferred assignment to an all-male unit.

4. Plaintiff Coble was not hired and on January 30, 1975, she filed a Charge of Discrimination with the EEOC.

5. Plaintiff Donna Riggs Beneze was a student at Texas Christian University in the criminal justice program in April 1975, when she applied for a summer internship with TDC. She was accepted in the program and informed by letter that free housing was provided to male interns but not available to females.

6. Plaintiff Beneze requested additional compensation to pay for lodging, but the request was denied. Plaintiff Beneze refused participation in the intern program because of the failure to provide housing.

7. Plaintiff Beneze filed a charge of discrimination with the EEOC on June 24, 1975.

8. In 1975, TDC provided male summer interns housing in extra space that was available in the bachelor quarters for correctional officers. There was no similar extra space available in quarters for female correctional officers. Since that time, space has also become unavailable in the bachelor quarters. TDC now provides housing for neither male nor female interns.

9. As of the time of trial, the TDC contained nearly 35,000 inmates in what will soon be twenty-five separate units, when the present construction of units is complete. Female inmates are maintained in separate units from males.

10. Both males and females are hired by TDC as correctional officers. The term “correctional officer”

describes both an occupation, as well as all beginning employees other than clericals or professionals. Correctional officers are given very little formal training.

***2** 11. It is the stated policy of TDC, and the evidence supports the statement, that female correctional officers work either in all-female units or in "non-contact" positions at all-male units. TDC does not assign correctional officers to permanent posts but rotates personnel to all positions within a prison unit. The purpose of this rotation is twofold: to compensate for the undisputed shortage of guards; to prevent inmates becoming too familiar with the habits and idiosyncricies of a particular guard. The effect of this rotation system is to preclude the use of female correctional officers in virtually any positions in male units. Females do work in mail rooms of all-male units and, as a result of the closing of an all-female unit in Huntsville, some females work as wall guards (pickets) or gate guards at all-male units. However, these assignments are regarded as a temporary deviation from policy, to accommodate long-term female employees. When these particular female correctional officers retire or resign, it is now intended that the positions will once again be filled by males.

12. Because of the TDC prohibition against females being in contact positions in all-male units, even female professionals such as nurses and attorneys are not permitted to be in close proximity to male inmates without the attendance of a male officer.

13. Some male correctional officers are used for security and control purposes at TDC female correctional facilities. The male officers do not perform duties within the housing units of those facilities; they do not perform strip searches of female inmates. The warden of the women's prison facilities testified that the use of these male officers hampered her flexibility in the assignment of correctional officers.

14. All correctional officers perform essentially the same duties whether male or female and receive salaries set by the State Legislature regardless of gender.

15. The TDC has a system of job benefits known as "emoluments," consisting of rations of foodstuffs given to correctional officers in addition to their salary. Emoluments are awarded to the position held, rather than to the person holding the position, and are based on the number of persons in the household. Whether a male or a female holds a position, the emoluments are the same, provided the number of persons in the household is the same.

16. TDC's enunciated purpose for treating gender as a bona fide occupational qualification for hiring only males to work in contact positions in all-male units is the privacy rights of the inmates. However, testimony of the TDC witnesses makes it clear that those privacy rights are secondary to the perceived security needs of the institutions.

17. The TDC operates its units with two primary purposes: first to protect society from the inmates and, second, to protect the inmates from each other. It performs this dual function despite large numbers of inmates, relatively small numbers of correctional officers, and a severe housing shortage. Despite continuing building programs, many inmates are double celled, some live in open dormitories and in some units a large number of inmates are housed in tents. To compound the security problem, inmates are not segregated by severity of the offense or by propensity to violence. Only juveniles and mentally or physically infirm inmates are housed in separate institutions.

***3** 18. To prevent escape, all TDC units are guarded by perimeter pickets. To prevent internal violence and the concealment of drugs, weapons and other contraband, the TDC relies on two devices: personal observation by correctional officers and the strip search. A significant amount of weapons and drugs is constantly being discovered in the possession of and removed from inmates. Defendant presented ample evidence of recovered contraband.

19. Every inmate at the all-male units is subjected to a strip search when he returns to the unit for food or at the end of the work day. These searches consist of the inmate being required to disrobe in full view of the correctional officers at the entry point, while his clothing is examined. He is personally required to show that his body is free of contraband.

20. In addition to searches on entry, each inmate is subject to being ordered to disrobe at any time and at any place in the unit if a correctional officer suspects the presence of contraband.

21. Strip searches are not scheduled or announced, so that no inmate can reasonably predict when he can safely smuggle contraband within the unit.

22. In addition to strip searches, inmates are kept in full view of correctional officers at most times. Ordinary cell doors have floor-to-ceiling bars, except for segregation cells which have solid doors. Dormitory beds are not separated by walls. Most significantly, toilet areas have only four-foot-high walls to allow viewing by officers, and showers are open to continuous viewing by officers. Inmates are given no time or place to be out of the view of officers where those inmates can engage in sex acts, violence toward each other, or use of illicit drugs.[1]

23. In view of the composition of TDC inmate population and the undisputed and well-known conditions existing in

TDC units, strip searches and the open construction of toilets and showers are essential to the safety of inmates as well as the safety of TDC personnel and visitors. Such techniques help prevent violence and discourage conduct which would constitute a breach of the rules of the institutions.

24. To permit females to observe strip searches or inmates using toilets and showers would deprive inmates of the minimal privacy afforded to them under present conditions.

25. TDC shop supervisors, many of whom began service as correctional officers, serve as security for the institutions as much as do the correctional officers directly assigned to security duty. Supervisors must conduct strip searches, as needed, and must also monitor inmates using toilets or showers.

26. Correctional officers who come into direct contact with inmates, unlike tower or wall pickets, perform their duties without weapons. Their ability to control the violent inmate or sex offenders within the prison population depends on their psychological make up, projection of authority, training and, as a last resort, their physical strength. Defendant presented several experienced prison administrators who testified that it is most important that correctional officers also be perceived by the inmate to be a person of some physical strength and ability to resist assault.

***4** 27. There was credible and persuasive testimony that while not all males are qualified to be correctional officers, most violence-prone or sex-offender inmates would be more likely to cause violence to and around a female correctional officer.

28. It is the practice at the various units of TDC for the correctional officers to be rotated among all the positions for which they are needed so that a person may be a tower or gate picket one day and on inside patrol the next. This is a convenience to supervisors to cover for absent officers and enables all officers to have experience on every job.

29. While it would be a minor inconvenience to TDC and would limit assignments to some extent, there is no compelling reason why females cannot serve as gate guards, tower guards, wall guards and in other non-contact positions where they would seldom, if ever, be called upon to take part in or observe strip searches and where they would not observe inmates using toilets or showers.

30. Approximately 13% of TDC's security force is female.

31. According to statistics offered by TDC which the Court finds reliable, some 14.3% of the female labor force in Texas is available for employment in the "protective-correctional" service field.

32. While Plaintiffs have not clearly established that there exists a class of female persons who have applied for and been refused positions as correctional officers in all-male units, the Court finds that the numerosity requirement of Fed.R.Civ.P. 23(a)(1) is satisfied, because the well-publicized hiring rules of TDC would preclude potential applicants from ever applying when they know they would not be hired.

33. There was no meaningful statistical evidence offered as to what percentage of the total protective-correctional labor force is female; nor was there valid statistical evidence as to what percentage of the applications for correctional officers received by TDC are from females. The data base relied upon by Dr. Tom Marshall, Plaintiffs' expert, was shown to contain numerous coding errors. This seriously undermined the validity and reliability of his analyses. Due to the narrowing of the class, much of his testimony as to pay and promotional discrepancies is irrelevant. His figures for the percentage of the "service" personnel in Texas who are female were not limited to those qualified to be correctional officers, but included waitresses, hairdressers, domestics and many other categories of persons irrelevant to the issues in this case.

34. Plaintiffs are not adequate class representatives as to the conditions of employment (emoluments, dry-cleaning and laundry, barber fund, dining hall privileges, etc.) because neither was ever employed by TDC.[2]

35. Plaintiffs are not adequate class representatives as to discriminatory treatment of female professionals other than correctional officers, such as nurses, attorneys and social workers. The circumstances in which these professionals have contact with inmates, the needs and purposes of their contact, raise different security and privacy issues than those raised by the correctional officer position.[3]

***5** 36. Plaintiff Coble is an adequate class representative for only the job classification of correctional officer and those positions at TDC normally filled by promotions from correctional officer.

37. Plaintiff Beneze is not an adequate class representative for women correctional officers or applicants for that position. Plaintiff Beneze never applied for and has never held such position with TDC or any other prison system. Her acceptance into the summer intern program does not establish a sufficient nexus with the class; she has not suffered the same alleged injury.

38. Plaintiff Coble is an appropriate and adequate

representative of a class consisting of: (a) all women who, since August 3, 1974,[4] have sought employment with TDC as correctional officers and who expressed a desire to work in all-male prison units, whether hired by TDC or not; (b) all females who, since August 3, 1974, would have sought such employment, but were deterred by known TDC policy from applying; and (c) all women who, since August 3, 1974, have been or are now employed by TDC as correctional officers and who have suffered or are suffering from loss of promotional or transfer opportunities because of TDC's policy of prohibiting females from working as correctional officers in contact positions in male prison units.

Conclusion of Law

1. This case arises under 42 U.S.C. § 2000e *et seq.* ("Title VII"); therefore, this Court has jurisdiction pursuant to 28 U.S.C. § 1331.

2. The Defendant is an employer within the definition of 42 U.S.C. § 2000e(b) and is subject to Title VII.

3. Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, makes it unlawful for an employer to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect the employee because of the individual's sex. 42 U.S.C. § 2000e–2(a)(2).

A. ***Redefinition of Class***

1. The dictates of *General Telephone Company of the Southwest v. Falcon,* 457 U.S. 147, 102 S.Ct. 2364 (1982), require that the class as certified on November 4, 1981, be modified and redefined as stated in Finding No. 38 above. Plaintiff Coble has only suffered the same alleged injury of female correctional officers or applicants who desired assignment to the male prison units or who were denied promotional opportunities because of TDC's policy. She did not suffer the same injury as women applicants or employees in other job classifications with TDC. *East Texas Motor Freight Systems, Inc. v. Rodriguez,* 431 U.S. 395, 403 (1977). Different questions of fact and law pertaining to the security and privacy issues are raised by the TDC policy as applied to other job classifications, especially professionals such as nurses, teachers, social workers and attorneys.

2. Plaintiff Beneze's claim and alleged injury relate only to the conditions of employment of summer interns. She does not share the same interests as regular employees or applicants for regular permanent employment. She is not an adequate representative of the class she sought to represent.

B. ***Plaintiff Beneze's Individual Claim***

***6** 1. Plaintiff Beneze's complaint about not being afforded housing or additional compensation for housing must be treated as one of discriminatory treatment. Under this theory, Plaintiff may establish a prima facie case by showing that she is a member of a protected minority and that because of her sex, she and a similarly placed male received dissimilar treatment. *Rohde v. K.O. Steel Casting, Inc.,* 649 F.2d 317, 322 (5th Cir.1981).

2. The burden then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the difference in treatment. If the defendant carries this burden of production, the plaintiff must then be given an opportunity to prove by a preponderance of the evidence that the proffered justification is merely a pretext for discrimination. The ultimate burden of persuasion remains with the plaintiff. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 252–256 (1981); *Joshi v. Florida State University,* 646 F.2d 981, 986 (5th Cir.1981), *cert. denied,* —— U.S. ——, 102 S.Ct. 2233 (1982).

3. Plaintiff Beneze established a prima facie case of sexual discrimination in TDC's provision of housing to male summer interns but its refusal either to provide similar free housing for female summer interns or compensate them for housing expenses. This constituted provision of different conditions of employment, which made it more difficult for female students to participate in the intern program.

4. TDC failed to articulate a clear and convincing non-discriminatory reason why they could not or did not take some steps to alleviate the disparity in treatment.

5. Plaintiff Beneze must prevail in her individual claim of discriminatory treatment by TDC.

C. ***Disparate Impact***

1. Plaintiff Coble alleges that TDC's policy of not employing females as correctional officers at male prison units has a disparate impact on women; that is, the policy results in fewer women correctional officers within TDC as a whole (male and female units) than would otherwise be the case. TDC responds by arguing (1) Plaintiffs have not demonstrated adverse impact, and (2) the percentage of correctional officers who are female (13.7%) is not significantly lower than the percentage of women in the total *female* labor pool who are available for

correctional/protective employment.

2. The disparate impact theory of recovery under Title VII is used to attack employment selection criteria that are facially neutral yet fall more harshly on a protected class of employees. *Pouncy v. Prudential Ins. Co. of America,* 668 F.2d 795, 799 (5th Cir.1982), citing *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 335 n. 15 (1977).

3. In order to establish a claim of discrimination under this theory, a plaintiff need only show that a facially neutral employment practice produces a significantly adverse impact on one sex. *Id.* at 800, citing *Dothard v. Rawlinson,* 433 U.S. 321, 329 (1977).

4. The discriminatory impact model of proof is not the appropriate vehicle from which to launch a wide-ranging attack on the cumulative effect of an employer's practices. *Pouncy v. Prudential Ins. Co. v. America, supra* at 800.

***7** 5. To the extent that TDC's policy of not employing women at male prison units is overtly discriminatory, the disparate impact model is inapplicable to Plaintiffs' case.

6. It is conceivable that the disparate impact theory would apply to this case, if one considered both aspects of TDC's policy; i.e., the practice of not using guards of either sex in contact positions—especially the housing units—of facilities for prisoners of the opposite sex. The issue regarding the limited use of male guards at female prisons was not raised in this case. Plaintiffs have only sought to extend the employment opportunities for females within TDC.

7. Plaintiff in a disparate impact case must first of all prove the discriminatory impact on the employer's work force due to the nondiscretionary selection procedure. *Id.*

8. Class plaintiffs need not prove intentional discrimination in a disparate impact case. *Johnson v. Uncle Ben's, Inc.,* 628 F.2d 419, 422 (5th Cir.1980), vacated and remanded on other grounds, 451 U.S. 902 (1981), on remand, 657 F.2d 750, 752 (5th Cir.1981), citing *International Brotherhood of Teamsters v. U.S.,* 431 U.S. 335 n. 15 (1977).

9. The disparate impact case may be proved by demonstrating that there is a significant statistical disparity between the sexual balance of an employer's work force and that of the community from which the workers are hired. *Rivera v. City of Wichita Falls,* 665 F.2d 531, 534 (5th Cir.1982).

10. Only upon plaintiff's establishing a prima facie case of discrimination would the defendant either have to discredit plaintiff's case or to show that despite the adverse impact, the challenged practices are necessary for the performance of the job. *Id.* at 535.

11. Statistical evidence must be meaningful and relevant. Expert testimony must establish the validity of the data base and methods used in the statistical model. *Wilkins v. University of Houston,* 662 F.2d 1156, 1157 (5th Cir.1981), *cert. denied* —— U.S. ——, 103 S.Ct. 51 (1982). Courts must not proceed toward broad conclusions from crude and incomplete statistics. *Wilkins,* 654 F.2d 388, 410 (5th Cir.1981), rehearing denied at 662 F.2d 1156, *cert. denied,* 103 S.Ct. 51 (1982).

12. Plaintiffs did not establish by their expert's statistical evidence a prima facie case of disparate impact. There was no comparison of the percentage of female correctional officers in TDC either to the total number of female applicants to TDC or to the percentage of females in the correctional officer labor pool. Neither Plaintiffs' nor Defendant's statistics were sufficiently valid and relevant to merit serious consideration by the Court. However, since Plaintiffs failed to prove the prima facie case, the inadequacy of TDC's statistics is irrelevant.

D. *Discriminatory Treatment*

1. Plaintiffs also sought to prove discrimination under a discriminatory treatment theory. Defendant's policy of not using female guards in male prison units is overtly discriminatory and establishes Plaintiff's prima facie case under this theory. *Gunther v. Iowa State Men's Reformatory,* 612 F.2d 1079, 1085 (8th Cir.1980), *cert. denied,* 446 U.S. 966 (1980). Defendant asserts, by way of an affirmative defense, that the policy is based on a BFOQ for correctional officers at male units.

***8** 2. Notwithstanding the prohibition of § 2000e–2(a0, Title VII further provides that it shall not be an unlawful employment practice for an employer to hire and utilize employees on the basis of sex in those certain instances where sex is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. 42 U.S.C. § 2000e–2(e)(1).

3. The burden of proof is on the Defendant to demonstrate that these positions fit within the BFOQ exception. *Weeks v. Southern Bell Telephone & Telegraph Company,* 408 F.2d 228, 232 (5th Cir.1969).

4. The BFOQ exception as to sex should be interpreted narrowly. *Dothard v. Rawlinson,* 433 U.S. 321, 324 (1977); *Diaz v. Pan Am. World Airways, Inc.,* 442 F.2d 385, 387 (5th Cir.), *cert. denied,* 404 U.S. 950 (1971); *Weeks, supra.* The test to be applied is business *necessity* not business *convenience. Diaz, supra,* at 388.

5. In *Diaz,* the court focused on the primary function of the defendant airline of providing safe transportation, and refused to sustain a BFOQ justified on the basis of tangential functions or customer preference. Similarly in this case, the Court will determine the reasonable necessity of TDC's BFOQ by focusing on (1) the primary function of TDC—to operate a secure prison system, one which protects society, the TDC employees, and the prisoners themselves; and (2) not the preferences, but the constitutional rights of the inmates.

6. In evaluating a defendant's asserted BFOQ, care must be taken not to confuse the doctrine of business necessity with the bona fide occupational qualification defense. *Swint v. Pullman-Standard,* 624 F.2d 525, 534 (5th Cir.1980), reversed on other grounds, —— U.S. ——, 102 S.Ct. 1781 (1982).

> The doctrine of business necessity is operative when an employment criteria which is "fair in form, but discriminatory in operation" is otherwise shown by the defendant to be related to job performance. *Griggs v. Duke Power Co.,* 401 U.S. 424 at 431, 91 S.Ct. 849 at 853, 28 L.Ed.2d 158. A bona fide occupational qualification, on the other hand, is deliberately calculated by the employer to discriminate. An employment criteria is justified under the bona fide occupational qualification defense when a certain sex, national origin, or religion is reasonably necessary to satisfy a particular business need. *Dothard v. Rawlinson,* 433 U.S. 321, 97 S.Ct. 2720, 50 L.Ed.2d 786 (1970). See also, *Phillips v. Martin Marietta Corp.,* 400 U.S. 542, 91 S.Ct. 496, 27 L.Ed.2d 613 (1971).

Id.

7. The central issue in the case *sub judice,* therefore, is whether the requirement for only male correctional officers at TDC's male prison units is reasonably necessary to satisfy the particular needs of those prison units.

8. Defendant TDC has focused on the need for security and the need to protect the male inmate's right to privacy. "Security" encompasses prevention of escape, deterrence of attempted escapes, physical safety of the guards, and protection of the inmates themselves from other inmates. The privacy needs of the inmates of greatest concern were during strip searches, both scheduled and random, and while the inmates are showering or performing toilet functions.

***9** 9. In this circuit, great weight is given to the E.E.O.C. guidelines, that the refusal to hire a woman because of assumptions about the comparative characteristics of women in general or stereotyped characteristics of the sexes does not warrant the application of the BFOQ exception. *Weeks v. Southern Bell, supra,* at 235, citing 29 C.F.R. § 1601.1(a).

10. In order to rely on the BFOQ exception, an employer has the burden of proving he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved. *Id.*

11. Although several of Defendant's witnesses testified as to their concern regarding the importance of the "appearance of strength" and the threats to security from the lack of such appearance, the opinions of these witnesses were unsupported by any objective evidence or firsthand experience of such problems arising from the use of female guards in male units.

12. Subjective perceptions of strength and other stereotyped images of women allegedly possessed by a large percentage of the inmate population cannot, as a matter of law, form the basis for the BFOQ. *Diaz, supra* at 387. *Weeks, supra,* at 236.

13. Similarly, the anticipated problems arising from the inmate "transference" phenomenon, fantasizing, and jealousy are speculative. To the extent they may be considered real problems arising from the presence of female correctional officers in male prison units, these concerns go more to the convenience than the necessity for the BFOQ.

14. Therefore, the Court concludes that the primary problem in this case is the recurring and much litigated one of weighing the employment rights of one sex against the privacy rights of incarcerated persons of the opposite sex. *See Dothard v. Rawlinson,* 433 U.S. 321 (1977); *Cumbey v. Meachum,* 684 F.2d 712 (10th Cir.1982); *Smith v. Fairman,* 678 F.2d 52 (7th Cir.1982); *Lee v. Downs,* 641 F.2d 1117 (4th Cir.1981); *Forts v. Ward,* 621 F.2d 1210 (2d Cir.1980); *Gunther v. Iowa State Men's Reformatory, supra.*

15. Defendant TDC established through the highly credible testimony of wardens and Director Estelle that the use of strip searches—both regular ones performed when prisoners re-enter the main facility, and random ones performed whenever the possession of contraband is suspected—are necessary to preserve security within the TDC units.

16. Defendant TDC established through reliable testimony that the open design of shower and toilet areas with the prison facilities is necessary to preserve security within the TDC units.[5]

17. Plaintiffs presented no evidence that the use of these measures was unnecessary nor did Plaintiff offer alternative means to maintain TDC prison security.

18. It is well established that convicted prisoners do not forfeit all constitutional protections by reason of their confinement in prison. *See Bell v. Wolfish,* 441 U.S. 520, 545 (1979) and cases cited therein.

***10** 19. However, these constitutional rights are subject to restrictions and limitations. *Id.* 545–546.

20. The prisoner's constitutional rights are limited by the fact of confinement and the legitimate goals and policies of the penal institution. There must be a "mutual accommodation between institutional needs and objectives" and Constitutional rights. *Id.,* quoting *Wolff v. McDonnell,* 418 U.S. 539, 556 (1974).

21. Maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of prisoners. *Id.* In fact, safeguarding institutional security is the central objective of prison administration. *Id.* at 547, cites omitted.

22. Prison administrators should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. *Id.* at 547, cites omitted.

23. Courts should not attempt to second-guess prison administrators in the management of prisons. *Id.* at 531, *Ruiz v. Estelle,* 679 F.2d 1115, 1126 (5th Cir.1982).

24. While strip searches and body cavity searches per se have been held not to be an unreasonable invasion of inmate privacy, they must be conducted in a reasonable manner. *Bell v. Wolfish, supra,* at 560, citing *Schmerber v. California,* 384 U.S. 757 at 771–772 (1966).

25. There is a constitutional right to privacy. See, e.g. *Carey v. Population Services, Int'l,* 431 U.S. 678, 684–86 (1977); *Roe v. Wade,* 410 U.S. 113, 152–56 (1973); *Griswold v. Connecticut,* 381 U.S. 479, 484–86 (1965).

26. Although the inmate's right to privacy must yield to the penal institution's need to maintain security, it does not vanish altogether. *Cumbey v. Meachum, supra* at 714; *Smith v. Fairman, supra* at 54.

27. The inmate may still assert the right against involuntary exposure of his unclothed body in the presence of persons of the opposite sex, at least in non-emergency situations. See *Cumbey v. Meachum, supra; Smith v. Fairman, supra; Lee v. Downs, supra* at 119–120; *Forts v. Ward, supra;* also see *Bowling v. Enomoto,* 514 F.Supp. 201, 204 (N.D.Calif.1981) and cases cited therein.

28. When the inmate privacy issue has arisen in the context of unclothed prisoners being viewed by guards of the opposite sex, courts have consistently based their decisions on the frequency, regularity, and predictability with which such incidents occurred. See *Cumbey v. Meachum, supra; Smith v. Fairman, supra* (no unconstitutional invasion of privacy for female guards to conduct pat-down search of fully clothed male inmates, including genital area); *Lee v. Downs, supra* at 1119–1120, (a violation of female inmate's privacy rights for male guards to remain in room and restrain inmate while her clothes were forcibly removed, where inmate had agreed to voluntarily remove her clothes if male guards left room; but *not* a constitutional violation for male guards to restrain her during body search by female guard after inmate herself removed dress and set fire to it—inmate was resisting search and immediate search was necessary); *Forts v. Ward, supra* (State must provide appropriate night wear for female inmates so that private parts of their bodies would not be visible to male guards checking cells); *Gunther v. Iowa State Men's Reformatory, supra* (affirming a district court order that a male prison unit make functional assignments to female correction officers so as to protect inmate privacy during strip searches and while inmates were using prison showers and toilets); *Bowling v. Enomoto, supra* (prison must devise procedures to preclude female guards observing male inmates while dressing, showering or using toilet facilities); *Hudson v. Goodlander,* 494 F.Supp. 890, 893 (D.Md.1980) (male inmate's rights violated by assignment of female guards to posts where they could view him while he was completely unclothed); *Avery v. Perrin,* 473 F.Supp. 90, 92 (D.N.Hamp.1979) (male inmate's right to privacy *not* violated by female mail clerk who walked passed his cell at same time every day).

***11** 29. The conflict between the privacy rights of inmates and the statutorily protected employment rights of guards of the opposite sex can be resolved only by an accommodation of the two. See, e.g., *Forts v. Ward, supra,* at 1217; *Smith v. Fairman, supra* at 55; *Bowling v. Enomoto, supra,* at 204–05; *Hudson v. Goodlander, supra;* at 892–894.

30. While a policy that completely precludes women being employed as correctional officers in male prisons does violate Title VII, selective work responsibilities excluding female officers from areas where inmates are showering, dressing, or likely to be subjected to strip searches is reasonable to protect inmates' privacy and does not unlawfully discriminate against women. *Reynolds v. Wise,* 375 F.Supp. 145, 151 (N.D.Tex.1974). This is the point at which prisoner privacy rights must prevail over employment rights.

31. Unplanned incidents arising during riots or other emergencies would not rise to the level of a constitutional violation of the inmate's right to privacy. *Lee v. Downs,*

supra at 1120–21; *Hudson v. Goodlander, supra,* at 894.

E. *Conclusion*

1. TDC's present and continuing policy of not hiring women to perform any correctional officer functions at male prison units cannot be justified as a BFOQ, and violates Title VII.

2. TDC's policy of not utilizing female correctional officers in "contact" positions in male prison units—i.e., those guard assignments which involve surveillance of areas where prisoners are showering, dressing, using toilet facilities, or subject to strip searches on a random, non-emergency basis, is a justifiable BFOQ, and does not violate Title VII.

3. The Court finds that due to the undisputed shortage of guards within TDC up to the present time, the administrative policy of having all correctional officers at any particular unit available for rotation to all guard positions was heretofore reasonably necessary in order to fulfill the prison system's mission. Therefore, there was no violation of Title VII in the past by the policy of not hiring women guards at male units.

4. Plaintiff Coble was not discriminated against in 1974 by TDC's failure to hire her as a correctional officer at a male prison unit. However, TDC is to give preferential consideration to Plaintiff Coble's application for a correctional officer position, should she re-submit it.

5. TDC is hereby ordered to prepare a plan whereby female correctional officers may be routinely employed and utilized at the male prison units in those positions or functional assignments that will protect the inmates' privacy interests. See *Gunther v. Iowa State Men's Reformatory, supra* at 1082. Such plan will be submitted to the Court, with a copy provided Plaintiffs, ninety days from the date of this order. The plan will include the number of positions at each unit that will be made available to women, the function of each position; the number of contact positions at each unit not being made available to women; and a functional description of those positions. A hearing will be scheduled on the proposed plan thirty days after its submission.

***12** 6. TDC argues that such functional assignment would unduly hamper their ability to make maximum use of their small number of guards; that they must be able to rotate their guards to any position within the facility. This argument goes more to TDC's business convenience than to necessity. See *Gunther, supra* at 1087. The Court further believes any scheduling problems created by this order should be reduced by the increased number of guards it will begin hiring to comply with *Ruiz v. Estelle,* 503 F.Supp. 1265 (E.D.Tex.1980). Affirmed in part and reversed in part, 679 F.2d 1115 (5th Cir.1982).[6]

7. A hearing on Plaintiff Beneze's damages will be conducted at the same time as the hearing referred to in paragraph 5 above.

8. Plaintiffs' motion for attorneys' fees will also be submitted within ninety days with full treatment of the factors in *Johnson v. Georgia Highway Express,* 488 F.2d 714, 717–19 (5th Cir.1974), as applied in *Copper Liquor, Inc. v. Adolph Coors,* 684 F.2d 1087 (5th Cir.1982). Defendant will have thirty days after the motion's submission to respond.

In the event that any of the foregoing findings of fact also constitute conclusions of law, they are adopted as such. In the event that any of the foregoing conclusions of law also constitute findings of fact, they are adopted as such.

Parallel Citations

40 Fair Empl.Prac.Cas. (BNA) 140

Footnotes

1 The physical and organizational conditions within TDC's maximum male penitentiaries are very similar to those of the Alabama prison system, in which the Supreme Court found that a female employee's "very womanhood would thus directly undermine her capacity to provide the security that is the essence" of a correctional officer's responsibility. *Dothard v. Rawlinson,* 433 U.S. 321, 326 (1977). See Finding 17 above. The prisoners have easy and frequent access to unarmed guards during movement to and from work areas and while working. In *Ruiz v. Estelle,* 679 F.2d 1115 (5th Cir.1982), the Fifth Circuit Court of Appeals affirmed the district court's finding that the totality of conditions in TDC prison units constituted cruel and unusual punishment of inmates. This conclusion was based on findings of serious overcrowding, severe understaffing, the very low guard-inmate ratio, and excessive nonhomicidal violence. *Ruiz,* at 1140–1142.

2 These conditions of employment are the subject of another suit in this district, E.E.O.C. v. T.D.C., No. H–81–280 (S.D.Tex.1982), in which a consent decree is due to be entered shortly.

3 The Court is also aware that Plaintiffs' witness Rosemary Sebastian, a nurse, currently has a sexual discrimination lawsuit pending in this district against T.D.C.

4 Plaintiff Coble filed her EEOC charge on January 30, 1975. She may represent all those persons within the described class who could have filed a timely EEOC charge on that date; i.e., those whose alleged injury occurred within 180 days of January 30. 42 U.S.C. § 2000e–5(e).

5 Many prison systems which make fuller utilization of opposite-sex guards involve facilities with solid-walled single occupancy cells possessing a solid door with a small window in the door for viewing, see *Forts v. Ward,* 621 F.2d 1210 (2d Cir.1980), *Bowling v. Enomoto,* 514 F.Supp. 201 (N.D.Calif.1981); or are medium or minimum-level security prisons. E.g., *Gunther v. Iowa State Men's Reformatory,* 612 F.2d 1079 (8th Cir.1980).

6 Under the terms of the agreement reached in *Ruiz v. Estelle, supra,* 2,695 additional staff positions are to be created: 429 are to be added to the Ramsey I, Ellis, and Eastham units by January 1, 1983; 472 are to be added to the Coffield, Ramsey II, Retrieve, and Darrington units by January 1, 1984; and 1,794 additional staff added to the rest of the units in the TDC system by January 1, 1985.